

10,1959

IN THE PRIVY COUNCIL

No. 4 of 1957

ON APPEAL  
FROM HER MAJESTY'S COURT OF APPEAL FOR  
EASTERN AFRICA

B E T W E E N

HASSANALI KURJI KANJI  
(Trading as Hassan Trading  
Stores) ... Appellant

- and -

10 GAILEY AND ROBERTS  
LIMITED ... Respondents

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
12 MAR 1960  
25 RUSSELL SQUARE  
LONDON, W.C.1.

55578

C A S E FOR THE APPELLANT

RECORD

20 1. This is an appeal, pursuant to leave granted by the Court of Appeal for Eastern Africa, from an order of the said Court of Appeal (Worley P., Sinclair V.P., and Briggs J.A.) dated the 29th June, 1956, affirming with variations a judgment and order of the High Court of Tanganyika (Cox C.J.) dated the 20th October, 1955, whereby it was ordered that the Respondents should recover against the Appellant the sum of Shs. 229,843/38. This appeal is brought against so much of the order of the said Court of Appeal as ordered that the Respondents should recover against the Appellant the sum of Shs. 118,444/70 in respect of the account with the Respondents of a concern known as Hassanali & Company,

p.97.

pp.79-84

30 2. The Respondents carry on business at, among other places, Moshi in Tanganyika. At the material times the Appellant carried on business at Moshi under the style and name of Hassan Trading Stores, and one H.K. Premji carried on business at Moshi under the style and name of Hassanali & Company and was the sole proprietor of the business carried on under that name. At the material times both Hassan Trading  
40 Stores and Hassanali & Company were

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customers of the Respondents.

pp.1-4.

3. On the 5th February, 1954, the Respondents filed a Plaint against the Appellant in the High Court of Tanganyika (Arusha District Registry), seeking to recover, among other sums, the sum of Shs. 118,444/70, which was the amount shown in the Respondents' books as being due to them from Hassanali & Company. By Paragraph 5 (as amended) of the said Plaint the Respondents alleged that:-

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p.9.

"In or about December 1951, it was agreed orally between Mr. F.A. Green the then Manager of the Plaintiffs at Moshi and the Defendant and H.K. Premji that Shs. 100,000/- should be transferred from the account of Mohamedally Jafferalli to the account of Hassanali and Co., and it was agreed at the same time that the balance of the said account of Mohamedally Jafferalli some Shs. 9,344/70 should be transferred to the account of Hassan Trading Stores of which the Defendant is the registered proprietor, and it was further agreed between the aforementioned parties that the Defendant would undertake the responsibility for the payment of the account of Hassanali and Co., which at the time of the said undertaking included the amount transferred from the account of Mohamedally Jafferalli ..... On or about the 4th day of March, 1953, the Plaintiffs' Manager Mr. Thrower approached the Defendant with regard to the payment of Hassanali and Co's account, whereupon the Defendant orally agreed that he was liable for the said account of Hassanali & Co., which he knew at the time stood at Shs. 121,444/70 and that all the accounts rendered to the Defendant have always included the said sum of Shs. 100,000/- shown to the Debit of Hassanali & Co."

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4. The Appellant by his Defence denied that he undertook the liability of Hassanali & Company. p.5.1.34.

10 5. The hearing of the action took place before Cox C.J. at Arusha on the 9th December, 1954, and at Dar-es-Salaam on the 14th and 15th June, 1955. At the hearing of the action it was agreed between Counsel for the Appellant and Counsel for the Respondents that the issue for the Court in respect of the aforesaid sum of Shs. 118,444/70 was whether the Appellant was liable therefor under the alleged agreement of December, 1951. p.62.1.27.

20 6. At the hearing of the action, it was contended on behalf of the Appellant that even if it were found as a fact that the Appellant had agreed in December 1951, to undertake liability for the account of Hassanali & Company, such agreement was void in law as being made without consideration. p.78.1.9.

30 7. In his judgment, given on the 20th October, 1955, Cox C.J., did not make any finding that in December, 1951, the Appellant had agreed with the Respondents to undertake liability for the account of Hassanali & Company, nor did he refer to the Appellant's contention that if any such agreement were established it was void as being made without consideration. The learned Judge nevertheless gave judgment for the Respondents against the Appellant in the sum of Shs. 229,843/38, in which sum the whole of the aforesaid sum of Shs.118,444/70 was included. pp.79-83. p.83.11.7-13.

40 8. From this judgment the Appellant appealed to the Court of Appeal for Eastern Africa, on the grounds, inter alia, that there was no or insufficient evidence to prove the agreement set up by the Respondents, namely, that in December, 1951, the Appellant agreed to accept liability for the amount due to the Respondents from Hassanali & Company, and further that in any event any such agreement was wholly without consideration and void in law. p.85. p.87.1.28. p.88.1.5.

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pp.90-2.

9. The Appellant's appeal came on for hearing before the said Court of Appeal on the 28th June, 1956, when the Court of Appeal, without calling upon the Respondents' Counsel to argue, reduced the amount of the judgment to Shs.206,429/09 but otherwise dismissed the appeal.

pp.93-7.

10. The reasons for the judgment of the Court of Appeal were given by Briggs J.A. and were delivered on the 18th July, 1956. In these reasons the Court rejected the Appellant's contention that the alleged agreement of December, 1951, was not proved. The Court said:

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p.95.1.8.

"We thought that, although Mr. Green's recollection was by no means clear and his evidence, had it stood alone, would not have afforded sufficient proof, that evidence was patently honest, and that the evidence of the parties' subsequent dealings could only be referable to the agreement which Mr. Green clearly believed to have been made. If the appellant's own evidence and that of his witnesses was to be rejected as untrue, the agreement alleged was established, if not beyond reasonable doubt, at least with such balance of probability as is necessary in a civil action".

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The Court then gave reasons for rejecting the evidence of the Appellant and his witnesses and concluded:-

p.96.1.43.

"The evidence for the Respondents had the same validity as if it stood wholly uncontradicted, and it was more than sufficient to establish their case and to justify the decree passed in their favour".

The Court did not in its reasons advert to the question whether there was any consideration for the agreement of December, 1951, which it found to be proved.

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11. The question in this appeal is whether on the basis that the evidence for the Respondents stands uncontradicted any consideration is shown for an agreement by the Appellant in December 1951, to undertake liability for the account of Hassanali & Company with the Respondents.

10 12. Section 25 of the Indian Contract Act, 1872, provides, with exceptions not material to this case, that an agreement made without consideration is void. Section 2 of the said Act provides as follows:-

"In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:

20 (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

(g) An agreement not enforceable by law is said to be void."

By section 126 of the said Act.

30 "A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called 'the principal debtor', and the person to whom the guarantee is given is called the 'creditor'. A guarantee may be  
40 either oral or written".

Section 127 of the said Act provides:

"Anything done, or any promise made, for the benefit of the principal

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debtor may be a sufficient consideration to the surety for giving the guarantee."

13. The principal witness for the Respondents was Mr. Green, who had been their Manager at Moshi in December, 1951. Mr. Green appears to have had no independent recollection of the making of the agreement with the Appellant or of the circumstances in which it was made. He based his evidence of an agreement with the Appellant on the fact that he received some post-dated cheques in respect of Hassanali & Company's account. It was proved by Mr. Thrower, who succeeded Mr. Green as the Respondents' Manager at Moshi, that these cheques were drawn by the Appellant in favour of Hassanali & Company and were indorsed over by Hassanali & Company to the Respondents. Mr. Thrower further gave evidence that the total amount of these cheques corresponded with the balance of Hassanali & Company's account in the Respondents' books.

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14. The extent of Mr. Green's recollection of the agreement and of the circumstances in which it was made is shown by the following passages from his evidence:-

Q. "Did anybody else agree to take the liability of Hassanali & Co's account ? - Well, frankly ... the only other one could be ... Kanji.

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Q. Was he present at this meeting ? - This I cannot answer definitely. I really don't remember whether he was present.

Q. Did he at any time agree to undertake the liability of Hassanali & Co's account ? - I think so, yes, because I had these cheques as I say.

Q. But did he verbally agree with you at any time to undertake the liability for that account as it stood ? - My impression was that he did.

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Q. You think it was quite a time ago ? - It was 1951."

And again:

p.20.1.22-  
p.21.1.7.

10 Q. "I want you to think very carefully Mr. Green. Did Mr. Hassanali Kurji Kanji of Hassan Trading Stores ever say to you that he would pay the account of Hassanali & Company ? - Well, I have been trying to puzzle over that for weeks. I cannot say emphatically that he did. All I can say is that the consequence was I got these post dated cheques.

Q. But to your recollection ? - My impression is that he did agree.

Q. That some form of agreement took place between you ? Yes.

20 Court: You cannot say emphatically that the Defendant personally, Hassanali Kurji Kanji, promised to pay Hassanali & Company's account ? - I cannot say.

But what about the cheques ?  
Yes, because I got cheques in payment of the amount.

From him ? - From him or Hassanali & Company because they had Hassanali & Company's stamp on them".

30 15. Mr. Green did not give as evidence, that, at the desire of the Appellant, he had done or abstained from doing anything or had promised to do or abstained from doing anything. Nor did he give evidence that anything had been done or any promise made for the benefit of Hassanali & Company. Nor was any such evidence given by the other witnesses for the Respondent. In particular, it appeared from Mr. Green's evidence that the account of Hassanali & Company was not transferred to the Appellant, and it appeared from the evidence of H.K. Premji, which was not challenged on this point, that the Respondents continued to send him monthly statements of account in respect of Hassanali & Company.

p.29.1.37.  
p.30.1.3.  
p.65.11.11-35.  
p.66.1.33-  
p.67.1.2.

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16. The Appellant submits that in order to render him liable upon an agreement to undertake liability for Hassanali & Company's account the onus was on the Respondents to establish that consideration was given for the agreement, and that the Respondents failed to establish that consideration was so given. The Appellant therefore submits that this appeal should be allowed and the judgment obtained by the Respondents reduced by the sum of Shs.118,444/70 for the following among other

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R E A S O N S

1. BECAUSE the evidence does not establish that any consideration was given for the Appellant's agreement to accept liability for the account of Hassanali & Company with the Respondents. 20
2. BECAUSE the said agreement was void.
3. BECAUSE the High Court of Tanganyika was wrong in failing to hold that the said agreement was void.
4. BECAUSE the Court of Appeal for Eastern Africa was wrong in failing to hold that the said agreement was void.

R.I. THRELFALL:

No. 4 of 1957

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B E T W E E N

HASSANALI KURJI KANJI  
(Trading as Hassan Trading  
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- and -

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C A S E FOR THE APPELLANT

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GIBSON & WELDON,  
27, Chancery Lane,  
London, W.C.1.

Agents for:

REID & EDMUNDS,  
Tanganyika.